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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 375

MIDLAND VALLEY RAILROAD COMPANY,
PETITIONER,

vs.

THOMAS BARKLEY ET AL., RESPONDENTS.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

O. E. SWAN,
VINCENT M. MILES,
THOMAS B. PRYOR,
Counsel for Petitioner.

(32,827)

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I.

Preliminary Statement.

This brief is to be supplemental to the brief heretofore filed in support of the petition for a writ of certiorari.

II.

The Facts.

B. & O. R. R. Co. *vs.* Public Service Commission, 81 W. Va., 457; 94 Southeastern Rep., 545, involved

an order of the Public Service Commission as to the distribution of coal cars. In the opinion, bottom of first column, page 547 of the reporter, the court describes the operation of a wagon mine:

> "Until the late fall of 1916 the team track loading mines constituted a negligible quantity in the mining and shipment of coal. Since that time the extreme demand for coal and phenomenally high prices have brought hundreds of them into existence, each one producing only small quantities, and all less than 5 per cent of the total shipments in June, 1917. Under normal conditions they could not profitably operate at all, and, when such conditions are restored, their production will, no doubt, cease. For this reason railroad managers have denominated them 'Snow Bird' mines or shippers. Ordinarily they do not load more than one car a day. They add nothing to the available supply of coal; for the regularly equipped mines are able to produce more than the carriers can transport. Less than 60 per cent of the cars demanded for coal transportation can be supplied, on account of a shortage of cars. The time consumed in the loading of cars by teams delays deliveries. Generally they keep each car assigned to them an entire day and often longer, when it could be loaded elsewhere in a few minutes. Cars placed on side tracks for team loading often have to be shifted off of them and back again, before the loading is completed, in the use of the sidings for other purposes. This involves loss of time of engines and crews, needed in the handling of cars for mines that would load perhaps 50 while they load one.

> These indisputable facts prove the operation of the team track loading mines retards and limits transportation, to the detriment of properly equipped mines, the carrier, and the general public."

All phases of coal car distribution are of importance, particularly to coal carrying roads such as the Baltimore and Ohio Railroad Company. It is obvious, too, we submit, that such distribution is of importance to the mine owners and to the public. This is reflected by the numerous decisions of the Interstate Commerce Commission and of this Court.

In U. S. *et al. vs.* Berwind White Coal Mining Co. *et al.*, the Assigned Car Cases, 274 U. S., 564, it is said:

> "The subject of discrimination in the distribution of coal cars in times of car shortage has occupied much of the time of the Commission ever since its establishment. Some general investigations of the matter were undertaken by it pursuant to resolutions of Congress."

Uniformity in the distribution of cars is essential to the coal mining industry. Without it discrimination will arise between shippers and likewise between State and Federal authorities. There can be uniformity only when there is one standard, and one set of rules, applicable to all shipments, State as well as interstate. It is our contention that uniformity of distribution of coal cars in times of car shortage results from the present terms of the Interstate Commerce Act and the decisions of this Court, and distribution in times

of shortage must be in accordance with the rules of the Interstate Commerce Commission and the Federal statutes and decisions.

The petition in this case is based squarely upon the State statute. The Supreme Court of the State so stated. The question is whether in times of coal car shortage, in this instance following the resumption of operation after a strike, the distribution of cars, which included both State and interstate destinations, is to be controlled by the State statute or by the Interstate Commerce Act.

III.

The Pleadings.

The petition is based upon a wrongful failure and refusal to furnish coal cars. The term "wrongful failure and refusal," and also the language, "was requested and demanded," appears in the petition eight times (R., 2, 3, 4). The petition does not refer to any provision of the Interstate Commerce Act, nor to any provision of the State statutes; nor is there any allegation as to discrimination between shippers.

The railroad company filed a demurrer, and set up the defense that the Interstate Commerce Act conferred exclusive authority on the Interstate Commerce Commission in the matter of distribution of coal cars.

In the answer, the defense as to the Interstate Commerce Act and regulations of the Commission was gone into with detail, and exhibits were attached covering the rules and regulations of the Interstate Commerce Commission in force at that time.

The State statutes involved are Sections 895 and 915 of Crawford & Moses' Digest of the Arkansas laws. Those sections read:

> 895. "When a shipper makes a written application to the station agent of a railroad for a car or cars to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight and its final destination, the railroad company shall furnish same at the place of shipment within six days from 7 o'clock a. m. the day following the application. Or where the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than six days' notice thereof, computing from 7 o'clock a. m. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application. Said station agent shall give the applicant a receipt for his application for car or cars upon the filing of said application. Provided, that it be the duty of every railroad company in this State to exchange loaded and empty cars in the transportation of such freight, for the purpose of facilitating its movement, with every other railroad with which it connects, forming a rate or route for the shipment of such freight or with which it has or participates in joint rates on such shipments; and for each of such railroads forming such route or having or participating in such joint rates, on demand of such connecting line, to furnish to it, within reasonable time, any such loaded cars as delivered and as many empty cars suitable for carrying such freight as may be de-

livered to it by such connecting carrier, for the purpose of transportation over its line, for delivery at any point on its line; and on demand of the owner thereof, it shall be the duty of such railroad receiving the cars of another to return the same within a reasonable time after demand therefor and within the time and according to the rules and regulations prescribed by the Railroad Commission of the State; provided, this act shall not apply to railroads of two miles in length and to railroads that are not public carriers. For failure to comply with this section, the railroad company so offending shall forfeit and pay to the shipper applicant the sum of five ($5.00) dollars per day or fraction of a day's delay after expiration of the free time, upon demand in writing made within thirty (30) days thereof by the shipper; provided, failure of the shipper to make demand on the railroad company shall not release the railroad company from its liability to the shipper for said forfeiture or demurrage charges."

915. "The commission shall formulate rules for furnishing of cars by railroad companies to shippers for transportation and delivery of freight and other requirements in compliance with this act within thirty (30) days after its passage, and shall publish said rules at least once a week for four consecutive weeks in one of the newspapers in general circulation in the City of Little Rock within sixty (60) days after its passage."

IV.

The Instructions.

Of the instructions requested by the plaintiffs and given by the court, No. 2 reads (R., 326):

> "If the defendant wrongfully failed, neglected or refused to furnish plaintiffs, upon proper requests therefor by them, coal cars in which to ship the output of their coal mine, and plaintiffs were damaged by such refusal, your verdict should be for the plaintiffs."

The third instruction requested by the plaintiffs and given by the court reads as follows (R., 326):

> "As a common carrier of coal in car lots the law and Interstate Commerce Commission required the defendant to provide itself with and to furnish upon proper request therefor, to shippers of coal in car lots on its line, a sufficient number of suitable cars in which to ship the coal on its line in accordance with the commissioner's rule of distribution which was originally and usually offered for shipment, and also to anticipate and provide for all such increased shipments of coal on its line as by the exercise of ordinary care and prudence it could anticipate and provide for.
>
> "If the defendant failed in its duty in this behalf towards the plaintiffs, as alleged in the complaint and the plaintiffs suffered damages thereby your verdict should be for the plaintiffs, Fax Coal Company."

From these it will be observed that No. 2 is without condition of any kind and is in strict accord with the language of the petition, namely, that the defendant failed to supply coal cars as requested and demanded by the plaintiffs.

As to No. 3, although reference is made to the Interstate Commerce Commission and the rules of the Commission, nevertheless nothing is said about ratings, and in the second paragraph the instruction is coupled up with the petition, where the gist of the complaint is the alleged wrongful failure and refusal to furnish coal cars as requested and demanded.

The theory of the trial court, sustained by the Supreme Court of the State, is further borne out by instruction No. 6 of the plaintiffs, which was granted, and which reads (R., 327):

> "If you find for the plaintiffs and find that they could and would have made and received net profits on shipments of coal from June 22, 1922, to January 1st, 1923, beyond that they did actually receive during said period if defendant had furnished sufficient coal cars to plaintiffs to take care of their coal shipments, then the plaintiffs are entitled to recover the amount of such additional net profits as damages in this suit, if such additional net profits are satisfactorily established by the proof."

The basis of that instruction is failure to furnish cars, as requested and demanded, to the plaintiffs to take care of their coal shipments.

The instructions requested by the defendant, which were given by the court, are found beginning at page 328 of the record. These appear to set out the theory of the defendant, if the case were being tried under the Interstate Commerce Act and in accordance with the rules of the Interstate Commerce Commission.

It is our contention that the instructions based upon the State statute should not have been given, and that this error was not cured by the giving of the instructions requested by the respondent on the theory that the case was controlled by the interstate law. The respondent tried to prevent the giving of wrong instructions, but was unsuccessful. The theory of the State law, upon which those instructions were based, was at direct variance with the theory of distribution based on the Federal statutes. It is not sufficient to say that there was evidence in the record to sustain a verdict based upon a violation of the rules based upon the Federal law. The petition having been based on the State law, and the court having instructed the jury accordingly, we submit that no other conclusion can be drawn than that those rulings were wholly prejudicial and led the jury astray. Gilmer *vs.* Higley, 110 U. S., 47; Vicksburg & M. R. Co. *vs.* O'Brien, 119 U. S., 99; Maryland *vs.* Baldwin, 125 U. S., 490.

V.

ARGUMENT.

(a) The decisions of this Court construing the Federal safety statutes support the supremacy of the Federal authorities in distributing coal cars in times of coal shortage.

In Southern Ry. Co. *vs.* United States, 222 U. S., 20, this Court held that the Federal safety appliance statutes embrace all locomotives, cars and similar vehicles used on any railroad that is a highway of interstate commerce.

There was a similar holding in Southern Ry. Co. *vs.* Railroad Commission of Indiana, 236 U. S., 439, involving a conflict with a statute of Indiana.

In the first of these cases, at the close of the opinion, this Court said:

> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traf-

> fic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

In Napier *vs.* Atlantic Coast Line R. Co., 272 U. S., 605, with which were considered two other cases, the court reaffirmed its views, but went even further because of the difference in the language of the statute involved. In the three cases there considered, the Commission had before it the statute of Congress extending to all parts of the locomotive and tender those provisions of the Federal statutes covering the locomotive boiler. There was no specific provision naming any particular part of the locomotive. On the contrary, the statute was of general terms, and provided that those provisions relating to the locomotive boiler should apply to all other parts of the locomotive and tender. This Court held that, notwithstanding, and although the Interstate Commerce Commission had not promulgated any orders relative to automatic fire box doors and cab curtains, nevertheless the intent of Congress was plain, and precluded exercise of authority on the part of the States.

If the coal carrying railroads are required to divide the supply of coal cars, it will mean that a certain

number will be set aside to meet demands under the State statutes, while the remaining cars are used for such orders as may be promulgated under the Federal statutes. This would mean, with a railroad like the Baltimore and Ohio, the possibility of one supply under the Federal rules and seven separate supplies, one for each of the seven States in which coal is mined along that railroad. What these demands under State laws will be no one can foretell until they have been made. To meet those demands, cars would have to be taken from those set aside for distribution under the Federal rules for interstate purposes. The result would be that all shippers would demand a full supply under the State statutes, and there would be no cars to be distributed under the rules contemplated by paragraph 12 of Section 1, and there would be endless confusion and obvious discrimination against the shipper who ordered cars under the Federal rule.

(b) No State statute or order can control the handling of interstate cars.

We submit that the State statute in the case at bar proceeds on the theory that the shipper has a right to an unlimited supply of coal cars at all times. The petition is framed on that basis, and the Supreme Court of the State so found. It is our contention that such a right never existed at common law. Furthermore, we contend that, in view of that right, the present provisions of the Interstate Commerce Act do not exist today.

In Pennsylvania R. Co. *vs.* Puritan Coal Mining Co., 237 U. S., 121, involving discrimination in the distribution of coal cars, this Court said in its opinion, at page 133:

> "Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right, and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old, in requiring the carrier to receive all goods and passengers, recognized that 'if his coach be full' he was not liable for failing to transport more than he could carry. Hutchinson on Carriers, 146; Lovett *v.* Hobbs, 2 Shower, 127; Riley *v.* Horne, 2 Bing., 217; Peet *v.* Ry., 20 Wisconsin, 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers—but, at the same time, required that they should be equally reasonable in the treatment of their patrons."

See also, on this same point, United States *vs.* New River Co., 265 U. S., 533, restricting the mine owner who is located on two railroads to a single supply, and also the Assigned Car Cases, 47 S. C. R., 727. When a coal car shortage occurs the carrier's "coach be full." We contend that in such an event the carrier cannot be required to perform the impossible.

Certainly, as to interstate cars, the State statute should have no effect.

In Missouri Pacific R. Co. *vs.* Stroud, 267 U. S., 404, was involved a Missouri statute authorizing treble damages for discrimination, based on the failure to supply cars. This Court held that the State statute had no effect upon interstate cars, because Congress had legislated on the matter of discrimination, including discrimination in the distribution of cars.

A similar decision was reached in C., R. I. & P. R. Co. *vs.* Hardwick Farmers' Elevator Co., 226 U. S., 426, where a State statute for the delivery of cars was held inoperative as to interstate shipments.

In St. L., I. M. & S. R. Co. *vs.* Edwards, 227 U. S., 265, the court held an Arkansas statute ineffective in attempting to apply demurrage on interstate shipments contrary to the interstate tariff.

That this is true as to all cars handling interstate commerce will not, we take it, be denied. However, it is our contention that, in times of car shortage, in so far as coal cars are concerned, the same principle applies to all coal cars, whether hauling State or interstate commerce.

It is true that in paragraph 4 of Section 1, the act states it to be the duty of every common carrier to provide and furnish cars upon reasonable request therefor. The only condition apparently annexed to this duty is contained in the expression "upon reasonable request." However, in the same section, paragraph 9, relating to the construction of a switch connection with a lateral, branch line or private side track,

obligates the carrier to furnish cars for traffic over such line "to the best of its ability, without discrimination in favor of or against any such shipper."

Section 22, which is stressed in the opinion of the State court in the case at bar, provides, in paragraph 1, "and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

All these provisions, paragraphs 4 and 9 of Section 1, and that part of Section 22 just quoted, were in effect prior to the addition of paragraphs 10, 11, 12, 13, 14 and 15 to Section 1. These last-named paragraphs are special and go into detail as to the supply and distribution of cars, paragraph 12 being exclusively devoted to the distribution of coal cars in time of shortage.

The situation here, then, is that we have amendments to the Interstate Commerce Act dealing with a specific phase of car supply, enacted after the provisions relating to the general distribution of cars. Under these circumstances, this Court, we contend, has held that the later and special supersede the earlier and general provisions.

Then, again, as to Section 22, it is our contention that at common law the right did not exist in a shipper to get cars on the basis of 100 per cent of his demands. See, as to this, Pennsylvania R. Co. *vs.* Puritan Coal Co., 237 U. S., 121, 133, as quoted above.

Moreover, this Court in that case (237 U. S., 121, at 129), in referring to the particular part of Section 22 now under consideration, said:

> "That proviso was added at the end of the statute—not to nullify other parts of the act or to defeat rights or remedies given by existing sections—but to preserve all existing rights which were not inconsistent with those created by the statute."

We submit that there is an obvious inconsistency between the obligation demanded by the State statute and the obligations created under the Interstate Commerce Act. The State statute requires that carriers furnish cars upon demand, fixing a period of six days for compliance. The provisions of the Interstate Commerce Act, on the other hand, provide for rules and ratings and the distribution of cars in accordance therewith, obviously making impossible, if those rules were pursued, a distribution to fulfill all the demands of the shipper.

(c) The present Federal statutes require uniformity of distribution of all coal cars in times of car shortage in accordance with the interstate rules and Federal statutes.

At the time of Illinois Central R. R. Co. *vs.* Mulberry Hill Coal Company, 238 U. S., 275, there was little then in the Federal statutes relative to car supply. What there was is quoted in part in the opinion, bottom of page 280. That part of the statute (paragraph 3, Section 1) referring to cars reads:

> "The term 'transportation' as used in this act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and

> facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *."

In paragraph 4 of the same section, the statute provides:

> "It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor * * *."

Nowhere is there any special reference to coal cars, or to duties in times of coal shortage.

To be compared with that rather meager provision are the present statutes, paragraphs 10, 11, 12, 13, 14 and 15 of Section 1, which for ready reference we carry as an appendix hereto.

We call particular attention to paragraphs 11 and 12 of Section 1, which read:

> 11. "It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."
>
> 12. "It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon

its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

Paragraph 12 is directed specifically against the distribution of coal cars, and requires the carriers to maintain and apply ratings, and to count each car furnished to or used by any mine for trasportation of coal, whenever conditions in the industry are such that the supply of cars available for such service does not equal the requirements of the mines.

Paragraph 12 becomes effective at once upon the arising of the emergency named, to-wit, "during any period when the supply of cars available for such service does not equal the requirements of such mines." It is not restricted to mines that ship coal in interstate commerce. It contains no exceptions in favor of State statutes. The statute does not require any finding by the Interstate Commerce Commission to determine when a car shortage exists. Under the rules

as to coal car distribution, every mine owner, by the publication of the number of cars available and the number of cars demanded by the shippers, as well as publication of the past performance of the mines, knows what cars are available, and what every shipper will receive under those rules from day to day. Everyone connected with the industry knows at once that there is a car shortage, whenever that car shortage develops. The statute is mandatory that when such a shortage occurs the carriers must comply with paragraph 12, without awaiting an order from the Interstate Commerce Commission. It is our position that the carriers can not so comply unless there be enforced a single standard, and all State statutes give way during periods of coal car shortage.

(d) This construction of the statute is sustained by recent decisions of this Court.

In Avent *vs.* United States, 255 U. S., 127, the court considered an order of the Interstate Commerce Commission promulgated under favor of paragraph 15 of Section 1, for preference or priority in the movement of coal. It is true that there was an order by the Commission finding the necessity for such priority order. However, paragraph 12, which specifically relates to the handling of coal cars, likewise contains a condition precedent to the effective operation of that paragraph, namely, a period when the supply of coal cars available does not equal the requirements of the mines. Paragraph 12 is more drastic, since it requires

compliance immediately upon the happening of the condition therein set out.

In the Avent case, this Court said:

> "That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried * * *. That it can do so without trenching upon the powers reserved to the States seems to us not to need argument * * *. That it can give the powers here given to the Commission, if that question is open here, no longer admits of dispute * * *. The statute confines the power of the Commission to emergencies and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed."

If Congress can delegate power to the Commission to determine when an emergency exists preliminary to issuing priority orders, it can, we contend, by statute itself fix the conditions under which the carriers shall maintain ratings and distribute cars to the mines. This it has done in paragraph 12 of Section 1. It is our contention that if the order in the Avent case is lawful, then it follows that Congress can, through paragraph 12, legislate as it has there done "without trenching upon the powers reserved to the States;" provided, of course, the emergency contemplated by the statute has come into existence.

We also call attention to two cases akin to the Avent case, to wit, United States *vs.* Koenig, 270 U. S., 512, and United States *vs.* Michigan Portland Cement Co.,

270 U. S., 521, involving priority orders as to distribution of coal, and in which the Avent case was followed:

We further call attention to the assigned car cases, United States *et al. vs.* Berwind White Coal Mining Co. *et al.*, 274 U. S., 564. The order of the Commission there involved was considered very far reaching. It required the carriers to count all cars, whether owned by foreign railroads or by private shippers, and applied to all carriers, whatever the character of the consignor or consignee of the shipment might be, and (we quote from the opinion of the court) "whatever the use to which the coal is to be put." The purpose of the order as this Court said, was "to prevent unjust discrimination among mines or shippers, and to provide reasonable service." The court then quotes paragraphs 12 and 14 of Section 1. In response to the argument, which was most strongly urged, that the rule prescribed absolute uniformity, regardless of the necessities of the railroad or of the consumer, and regardless of the ownership of the mines or the cars, or the character of the business done by the mine or its customer, this Court said:

> "We cannot say that it was arbitrary and unreasonable for the Commission to conclude that good service could be secured by a uniform rule which might be departed from with its consent and that unjust discrimination could not be prevented without such a uniform rule. It acted in the light of a rich experience. It had learned by experience that the existing practices resulted in discrimination and unsatisfactory service. It had learned, also through experience,

> that the emergency powers conferred by the Transportation Act, 1920, afforded adequate means of supplying the needs, and of averting the possible hardships and losses, of carriers and of private coal consumers, to which the evidence and arguments had been largely directed. For the Commission had had much experience in applying these emergency powers in connection with the distribution of coal cars in times of car shortage, before it prescribed the rule here challenged. Moreover, so far as concerns railroad fuel cars, the operation of the rule as modified from time to time by emergency orders would resemble the practice of the car service section of the railroad administration during Federal control."

Of course, it must be presumed that the Congress, in enacting paragraph 12, had adequate information on the subject, and acted in the light of existing conditions. Its conclusion as to the appropriate remedy is, we contend, entirely within its powers. Paragraph 12 establishes an emergency as a condition precedent to the ratings going into effect, but when that emergency arises the carriers must make it effective, and must make it uniform, regardless of the ownership of the cars or the character of the business done by the mine.

In United States *vs.* New River Co., 265 U. S., 533, this Court sustained an order of the Commission as to the distribution of coal cars to mines located on more than one railroad, calling attention to the provisions of the statute as to the distribution of coal cars.

including paragraph 12 of Section 1, and stated that "the Interstate Commerce Act confers power on the Commission to regulate the distribution of cars * * * and its jurisdiction over the subject is exclusive."

(e) This construction of the statute is sustained by decisions of other courts.

In L. & N. R. Co. *vs.* Brashear, 217 Ky. 439, 289 Southwestern Rep. 1094, the question was whether, notwithstanding general order No. 14 of the Interstate Commerce Commission, a mine operator could insist upon a full supply of cars under the State statute.

The court held that although the wagon mine operator was entitled to cars, still, in view of the statutes of Congress, the rules sanctioned by the Interstate Commerce Commission had precedence over the State statute. Here, as in the case at bar, complainant relied upon the State statute. The Kentucky court held that under the authority of B. & O. R. Co. *vs.* Lambert Run Coal Co., 267 Fed., 776; 258 U. S., 377, the case should have been dismissed for want of jurisdiction in the State court, in that the questions involved were of exclusive Federal jurisdiction, either before the Interstate Commerce Commission or the appropriate District or Circuit Court.

In B. & O. R. Co. *vs.* Public Service Commission, 81 W. Va., 457; 94 Southeastern Rep., 545, was involved an order of the Public Service Commission of the State acting under a State statute, setting aside

a regulation of the Railroad Company as to the distribution of coal cars. The syllabus is by the court. Paragraphs 4 and 5 read:

> "In view of a great shortage of cars suitable for coal shipments, occasioned by extraordinary conditions bringing into temporary activity a great many mines that are not equipped with tipples for loading cars, but demand pro rata allotments to them of open-top cars for their shipments, which can not be furnished without serious detriment to permanent and properly equipped mines, the carrier, and the general public, a railroad company of which such allotments and distributions are demanded may, by promulgation of a regulation applicable to all such mines, assign its open top cars to the permanent and properly equipped mines and box cars to those loading without tipples and from wagons and trucks. Such a regulation, under such circumstances, is neither unreasonable nor unjustly discriminatory."
>
> "In so far as section 66c of chapter 54, Code of 1916, contemplates equality of transportation facilities among shippers of coal, in point of mere convenience, not reasonable means of transportation within the ability of the carrier, it applies only to mining industries having efficient and usual equipment for loading coal cars."

The Kentucky court in L. & N. R. Co. *vs.* Brashear, 217 Ky., 439, *supra*, cites Harp *vs.* Choctaw, O. & G. R. Co., 125 Fed. Rep., 445 (C. C. A. 8), where the railroad company refused to continue a practice of permitting mines operated with hand shovels and

wagons to load cars on side tracks. At page 450 of that opinion it is said:

> "This power to make reasonable regulations with respect to the manner in which it will receive commodities for transportation implies the existence of a power on the part of a common carrier to change or modify such regulations from time to time upon reasonable notice to the public, as otherwise it might be compelled to pursue a particular practice of receiving goods which it had once adopted, and was at the time attended with no inconvenience, after that practice had become exceedingly inconvenient and burdensome both to itself and the public. It is manifest, we think (indeed, so manifest that we might almost take judicial notice of the fact), that no railroad constructed through extensive coal fields and engaged in transporting coal to market could for any considerable period follow the practice of setting out cars on its station side tracks, some distance from the place where coal is mined, and permitting coal to be hauled thence by wagons and loaded into the cars by the slow process of shoveling. The useless consumption of time, and the additional expense incident to the handling of the commodity in question, in large quantities, in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains and the transaction of its other business."

If the holding of the eighth circuit in this case is sound (and we maintain that it is), namely, that the railroad company has a right to change its rules and regulations, as long as the changed rules are reasonable in their nature, all the more would they have the right—in fact, it would be their duty—to make changes to comply with the mandatory provisions of paragraph 12 of Section 1.

In Robinson *vs.* B. & O. R. R. Co., 129 Fed., 753 (C. C. A. 4), the railroad company had permitted loading by wagons of coal cars at a station siding, and to prevent the company from discontinuing this practice the shipper had obstructed the station grounds. The shipper was enjoined from so interfering. In the opinion, at page 755, the court says:

> "The appellants' principal justification was that they had before the notice been in the habit, from time to time, of shipping small quantities of coal at Walker's Siding. The reply to this by the railroad company was that on account of the scarcity of other coal in the winter of 1902, and the rise in price, the quantity shipped at Walker's Siding became so great that it interfered with other merchandise, and the railroad company was compelled, in the reasonable regulation of its business, to provide another place for shipping coal from Fairmont."

In Majestic Coal & Coke Co. *vs.* Interstate Commerce Commission, 162 Fed., 810, an injunction had been prayed against an order of the Interstate Commerce Commission as to the use of assigned cars. The

court sustained the order, although it was claimed that the order applied to private and foreign fuel cars which were used only in interstate transactions.

A similar holding was made in Penn. R. Co. *vs.* Interstate Commerce Commission, 193 Fed., 81.

(f) Sections 13 and 15a of the Interstate Commerce Act do not militate against the position of the railroads.

Section 13 is popularly referred to as the Shreveport section, because of the decision of this Court in Houston East & West Texas R. Co. *vs.* United States, 234 U. S., 342. Section 13, among other things, provides for a hearing to determine whether any rate or regulation or practice imposed by a State authority unduly interferes with or discriminates against interstate commerce. By its terms, it calls for an investigation by the Interstate Commerce Commission, with notice to the State authorities. The case at bar does not involve Section 13. It did not arise as a result of any complaint before the Interstate Commerce Commission as to the discriminatory character of the Arkansas statute. It arose in a State court, in a suit brought by a mine owner for damages because of failure to comply with a State statute. The railroad company complains here because of the failure of the State court to give due force and effect to the provisions of the Interstate Commerce Act relative to the distribution of coal cars, and attacks the application of the State statute where the conditions prescribed in the interstate commerce law exist. What we have heretofore

said concerning the difference between paragraph 12 of Section 1 and other portions of Section 1 relating to priority orders applies here also, in that Section 13 requires preliminary action on the part of the Commission, in finding certain facts to exist, whereas paragraph 12 of Section 1 fixes its own standard when its provisions become effective.

The same observations may be made as to the provisions of Section 15*a* of the Interstate Commerce Act, in so far as action by the State authorities may affect the financial return to the carriers, the leading case under this section being the so-called Wisconsin rate case—Railroad Commission of Wisconsin *vs.* C., B. & Q. R. Co., 257 U. S., 563. Here, too, Section 15*a* requires an investigation by the Commission and a finding of certain facts. In the Wisconsin rate case this Court disclaimed any intention of construing Section 15*a* as giving to the Interstate Commerce Commission unified control of interstate and intrastate commerce. The railroads here are not contending that such uniform control as to the distribution of coal cars exists under all circumstances, but do contend that where a coal-car shortage arises, as set forth in paragraph 12, then the unified control automatically becomes effective.

Moreover, the nature of the subject covered by these respective provisions of the Interstate Commerce Act, to wit, paragraph 12 of Section 1, and Sections 13 and 15*a*, supports the contention of the carriers in the case at bar.

The effects of orders of the State authorities in so far as they concern the rates and revenues of the carriers do not automatically reveal themselves, and do not in and of themselves necessarily involve a discrimination against interstate commerce. There are many factors requiring investigation before a conclusion on these questions can be reached, so that Congress has made provision for such a preliminary determination by the Interstate Commerce Commission before the provisions of Sections 13 and 15*a* become effective.

Under paragraph 12 of Section 1, Congress has not provided for any preliminary determination. The carriers handle the supply of coal cars as a unit, and distribute them among the mines regardless of the character of the commerce in which the cars are to be used. If the shipper under the State law is to receive cars on an unlimited basis, it is obvious that there can be no distribution in accordance with ratings and on a uniform basis, to meet the requirements of paragraph 12 of Section 1.

VI.

Conclusion.

Although in the case at bar there is only a small coal mine involved, still the importance of the question to the carriers and those engaged in the coal industry is large. During such periods, when the supply of coal cars available for the transportation of coal does not equal the requirements of the mines, it is

obvious that the prices of coal go up, and it is further obvious that such mines that are able to get cars have advantages over those mines that do not get cars. It is immaterial whether that advantage results through the connivance of the carrier, or whether it results because of attempted compliance by the carrier with an order of the State authority. When the supply of coal cars available does not meet the requirements of the coal mines, then every empty coal car becomes of importance to the mining industry. Situations such as in the case at bar can readily be multiplied many fold, especially where the great coal carrying railroads are in operation, the result being that thousands of cars may be involved as a result of supplying these wagon mines or other shippers in accordance with the State authorities rather than under the uniform regulations of the carriers in force because of the provisions of paragraph 12. Under the provisions of paragraph 12, the carriers, without awaiting word from anyone, must maintain and apply just and reasonable ratings to the mines on its railroad, and count every car furnished to such mines for loading coal against the total supply available for such mine, whenever the available supply does not equal the demand.

It is our contention that it was a wise provision to dispense with any preliminary action on the part of the Commission. Preliminary action would make for delay, which would be a handicap during a period of coal-car shortage. The practice of each road pooling all its coal cars into one single car supply was recognized by Congress. This could not be done if the

various States had power to require an unlimited car supply. If there are not enough cars to meet the total demand, and out of the available supply the shippers demanding cars under the State law are to have all the cars they want, then the available supply is to that extent diminished, and only the residue is left to meet the demands under paragraph 12.

Wherefore, we respectfully submit that the court in the case at bar should find in favor of the railroad company, and should also find that by reason of the provisions of paragraph 12 of Section 1, and the other provisions of Section 1, relating to coal-car distribution in times of car shortage, the authority of the State to regulate the subject is suspended in times of coal-car shortage.

Respectfully submitted,

O. E. SWAN,
VINCENT M. MILES,
THOMAS B. PRYOR,
Counsel for Petitioner.

APPENDIX.

(Paragraphs 10, 11, 12, 13, 14 and 15 of Section 1, Interstate Commerce Act.)

(10) The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.

(11) It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which

may be recovered in a civil action brought by the United States.

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this act relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations, or practices.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (*a*) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the

Commission; (*b*) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (*c*) to require such joint or common use of terminals, including mainline track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after susequent hearing find to be just and reasonable; and (*d*) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

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IN THE

Supreme Court of the United States

MIDLAND VALLEY RAILROAD COMPANY,.....*Petitioner,*

v. No. .....

THOMAS BARKLEY ET AL,.....*Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

Come now the respondents and say that the judgment of the Supreme Court of the State of Arkansas in this cause was rendered on the 14th day of February, 1927, and that petitioner's petition for rehearing in the Supreme Court of Arkansas was overruled by that court on March 14, 1927. 291 S. W. Rep. p. 431. The printed record in this case shows the above statements to be true.

On June 9, 1927, counsel for petitioner delivered to counsel for respondents two copies of petition in this court for certiorari and brief thereon and also two copies of the praecipe for printing of certain portions of the record in the case.

On July 19, 1927, counsel for petitioner delivered to counsel for respondents a copy of the printed record in this court. The copy of the printed record of the case in this court does not disclose whether the printed record of the case had at that time been filed in this court or not. The records of this court will show when this printed record was filed and will show also that a copy of this printed

record was delivered to counsel for respondents on July 19, 1927.

Section 8 of the Act of Congress of February 13, 1925, provides:

"That no writ of error, appeal, or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months: *Provided*, That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."

Section 1 of Rule 35 of the Rules of this court provides that a petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals or the court of appeals of the District of Columbia, shall be accompanied by a transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed.

Section 2 of the same rule provides that the petition for certiorari shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ; that a supporting brief may be included in the petition; that a failure to comply with these requirements will be a sufficient reason for denying the petition; that forty printed copies of the petition and supporting brief shall be filed.

The concluding portion of Section 2 of said rule of this court is as follows:

"The petition will be deemed in time when it, the printed record, and the supporting brief, are filed with the Clerk within the period prescribed by section 8 of the Act of February 13, 1925."

Section 3 of the same rule provides:

"Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief, shall be served by the petitioner on counsel for the respond-

ent within ten days after the filing, and due proof of service shall be filed with the clerk."

Respondents say that the petition for writ of certiorari in this case should be denied for the reasons that the petitioner in this case has not complied with the rules of this court and the Act of Congress with reference thereto within the time and in the manner required by said act and said rule.

II. Respondents deny that the question presented by the petition in this case is as to whether or not the Congress has so legislated with reference to the distribution of the available coal car supply by the railroads of the United States that the common-law and state statutes on the subject are superseded.

Respondents deny that if the decision of the Supreme Court of Arkansas in affirming the judgment rendered against the petitioner in this case is permitted to stand, it will materially affect the distribution of the coal car supply by the railroads of the country, or that it will render nugatory the orders of the Interstate Commerce Commission pertaining thereto.

Respondents deny that this court will take judicial notice that the Interstate Commerce Commission has assumed full jurisdiction under the Act of Congress referred to and has adopted rules and regulations governing the distribution of coal cars by all railroads in the United States, at least so far as the facts of the pending controversy are concerned.

The respondents deny that the Supreme Court of Arkansas has in its opinion decided a federal question of substance and great importance, and not heretofore directly determined by this court and deny that it is very important that the Act of Congress shall be construed by this court in this case.

The respondents deny that the principle involved is one of serious importance to all railroads and to operators of coal mines in the United States, and deny that it should be determined by the court in this case as to whether or not the statutes of the various states have been superseded by the Act of Congress.

Respondents say that there is no question involved in this case as to whether or not the statute of the State of Arkansas or of the various states of the union have been

superseded by the acts of Congress, and respondents further say that the complaint of the plaintiffs herein, the record of the trial below and the opinion of the Supreme Court of the State of Arkansas in this case, all of which appear in the printed record, filed in this court, show that no such question is involved in this case.

For these reasons, respondents say that the petition for writ of certiorari herein ought to be denied.

U. C. MAY,

CHAS. I. EVANS,

JEPTHA H. EVANS,

Counsel for Respondents.

BRIEF IN SUPPORT OF THE RESPONSE.

No right of the petitioner under the Act of Congress approved February 28, 1920, plead by the petitioner, was denied to the petitioner in this case either by the trial court or by the Supreme Court of the State of Arkansas.

Sections 895 and 915 of Crawford & Moses' Digest of the statutes of the State of Arkansas were not involved in the trial of this cause in the trial court nor were they involved in the questions determined by the Supreme Court of Arkansas in this case.

The Supreme Court of Arkansas did not hold that the respondents were entitled to anything under said sections of the Arkansas statutes and did not hold against any act of Congress in favor of the statutes of Arkansas.

The complaint of the respondents filed in the Circuit Court of the State of Arkansas is found at pages 1-4 of the printed record.

A paragraph of the complaint is as follows:

"Plaintiffs performed a great amount of development work in said mine at heavy expense to themselves and purchased and placed therein a large quantity of machinery and equipment in order to put said mine in condition for profitable operation during the term of their lease.

In the latter part of June, 1922, at a time when plaintiffs had developed said mine to the point that it could be profitably worked during the remainder of the term of plaintiff's lease, the defendant through its agent one Tyler demanded of plaintiffs that plaintiffs sell and turn over to defendant the output of coal from their said mine at the price of $3.55 per ton when coal was bringing on the open market much more than that price, and defendant, through its said agent, Tyler, threatened plaintiffs that if plaintiffs failed to sell and deliver to the defendant the coal from their said mine at said price the defendant would fail and refuse to furnish plaintiffs with coal cars in which to ship the output of their coal mine and that thereby plaintiffs' coal mine would be compelled to shut down. Plaintiffs refused to sell and deliver to the defendant their coal at the price as demanded and thereafter the defendant wrongfully failed and refused to furnish plaintiffs coal cars in

which to ship the coal from their said mine, although the plaintiffs duly requested the defendant so to do." P. R. 2.

It is thus seen that the gravamen of the respondents' claim against the petitioner in the court of the first instance had nothing whatever to do with any administrative question. The question involved in the case was purely judicial question, question entirely within the jurisdiction of the State trial court.

If the question involved in the case had been an administrative question, this would have been beyond the jurisdiction of the court but such is not the case.

If the question involved had been one with reference to the distribution of coal cars on the Midland Valley Railroad and the Interstate Commerce Commission had made an order with reference thereto and this order had been attacked by the respondents in their suit the court would have had no juridiction.

The petitioner put in evidence a great number of orders of the Interstate Commerce Commission and these are found in the printed record pages 233-288. None of these orders have any application to the Midland Valley Railroad Company and none of them cover any operations of the Midland Valley Railroad Company during the time in question, or profess to do so.

Respondents in their brief in the Supreme Court of Arkansas set forth a letter from the Interstate Commerce Commission which said that the Interstate Commerce Commission had made no order with reference to the distribution of coal cars on the Midland Valley Railroad during the period in question. This was set forth under the contention of the petitioner in its brief in this case in the Supreme Court of Arkansas that the courts would take judicial notice of the orders, rules and regulations of the Interstate Commerce Commission.

If the contention of petitioner with reference to that matter in the Supreme Court of Arkansas is correct then this court will take judicial notice that no rule or regulation or order of the Interstate Commerce Commission was had or made or rendered with reference to the distribution of coal cars by the Midland Valley Railroad during the period in controversy in this case.

The record in this court in this case will show and does show that no order or rule or regulation of the Interstate

Commerce Commission with reference to the distribution of coal cars during the period in question is in any way involved. The record shows that no rule, order or direction of the Interstate Commerce Commission is attacked or called in question by the respondents; that the only question insisted upon by the respondents is a judicial question and one within the jurisdiction of the court of first instance.

The decision of the Supreme Court of Arkansas in this case is found in the printed record pages 347-361.

The first paragraph of the decision of the Supreme court of Arkansas, after stating the contentions of the parties, the proceedings in the court below, and the result of the trial, is as follows:

"Section 402 of what is designated as the Transportation Act of Congress February 28, 1920, amends Section One of the Interstate Commerce Act approved May 29, 1917, to read as follows:

'(10) The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

'(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.'

Paragraph (12) makes it the duty of carriers by railroads to make just and reasonable distribution of cars for transportation of coal among the coal mines served by them whether located upon their own lines or lines dependent upon them for car supply. When the car supply is not equal to the requirements of the mines, it is the duty of the carriers to maintain and supply just and reasonable rating of such mines and to count each and every car furnished to, or used by, any such mine, for transportation of coal against the mine, and a penalty is attached for failure to comply with this provision.

Under paragraph 13 the Interstate Commerce Commission is authorized to order any or all carriers by rail-

road subject to the act to file with the Commission from time to time their rules and regulations with respect to car service, which rules and regulations shall be incorporated in their schedules, showing rates, fares and charges for transportation, and making the carrier subject to all provisions of the act.

Under paragraph No. 14, the commission may, after hearing on a complaint, or upon its own initiative, establish reasonable rules, regulations and practices with respect to car service by railroads subject to the act, and prescribe a penalty for non-observance of these rules, etc.

Under paragraph 15 whenever the Commission is of the opinion that shortage of equipment, congestion of traffic, or other emergency, with or without complaint, or on its own initiative and with or without notice to the carrier and without hearing or filing of report, it is empowered (2) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon or in the event of their disagreement as the commission may, after subsequent hearing, find to be just and reasonable, etc. U. S. Statutes at Large Vol. 41, Chp. 91, pg. 476, Sec. 402.

By an act of Congress September 22, 1923, U. S. Statutes at Large Vol. 42, p. 1025, an act was again passed entitled 'An Act to declare a national emergency to exist in the production, transportation and distribution of coal and other fuel, granting additional powers to the Interstate Commerce Commission providing for the appointment of a Federal Fuel Distributor, providing for the declaration of car service priorities during the present emergency, etc.' Section 2 provides in part as follows: 'That the powers of the Interstate Commerce Commission under the act entitled 'An Act to regulate commerce' approved February 4, 1887, as amended, including the Transportation Act 1920, and especially under Sec. 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue in transportation of coal or other fuel orders for priorities in car serv-

ice, embargoes, and other suitable measures in favor of, or against any carrier, * * * and to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal or other fuel so as best to meet the emergency and to promote the general welfare, and to prevent upon the part of any person, partnership, association, or corporation, the purchase or sale of coal or other fuel at prices unjustly or unreasonably high. This act shall not be construed as repealing any of the powers heretofore granted by law to the Interstate Commerce Commission, but shall be construed as conferring supplementary and additional powers to said commission, and as an amendment to section 1 of the Interstate Commerce Act and subject to the limitations and definitions of commerce controlled by said act and all powers given said Interstate Commerce Commission shall be applicable to the execution of this act.'

Learned counsel for the appellant contend that it was the purpose of Congress in the above enactments to vest the Interstate Commerce Commission with supreme power in the matter of distribution of coal cars regardless of whether the coal was to be shipped in intra or interstate commerce. Counsel for appellant say: "It is the contention of the defendant that all State statutes and common-law obligations are swept away, as far as the transportation of coal, or the furnishing of cars, in which to transport the same, by the provisions of the Transportation Act, and the later emergency act of September 22, 1922." We cannot agree with counsel in this contention.

Section 8 of the Interstate Commerce Act, Vol. 24, Statutes at Large, p. 379, Supp. to Revised Statutes of the United States, 529, provides as follows: "That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, etc."

Section 9 provides that "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission, as hereinafter provided for, or may bring suit

in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction."

Section 22 provides in part as follows: "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

These provisions of the Interstate Commerce Act approved February 4, 1887, were not repealed expressly or by implication by the provisions of the Transportation Act of Congress of February 8, 1920, and the Emergency Act of September 22, 1922, upon which counsel for appellant relies. On the contrary, the above provisions of sections 8, 9 and 22 of the Interstate Commerce Act were in full force and effect when appellees' cause of action is alleged to have accrued. Counsel for the appellees concede that the cars which it is alleged appellant failed to furnish were ordered for and to be used in interstate shipments. Such being the case, the provisions of section 22 of the Interstate Commerce Act, *supra,* confers jurisdiction upon the State court. The question, we believe, is thoroughly settled against the contention of counsel for the appellant by decisions of the Supreme Court of the United States.

In *Pennsylvania Railroad Co.* v. *Puritan Coal Mining Co.,* 237 U. S. 121, Mr. Justice Lamar, speaking for the court, said: "But sections 8 and 9 standing alone, might have been construed to give Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently for the purpose of preventing such a result, the proviso to section 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' * * * But for this proviso to section 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the State courts, and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the State courts of their general and concurrent jurisdiction.' It was further

declared in that case concerning sections 8, 9 and 22 of the Interstate Commerce Act construing the same as a whole, that 'it did not supersede the jurisdiction of State courts in any case new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive.'

And in the case of *Pennsylvania Railroad Company* v. *Sonman Shaft Coal Co.*, 242 U. S. 120, Mr. Justice Van Devanter, speaking for the court, among other things, said: "Thus we have held that a manifest purpose of the provision in section 22 is to make it plain that such 'appropriate common-law and statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced." Then, after reviewing and reiterating the doctrine of the above case of *Railroad Co.* v. *Puritan Coal Company, supra,* and other cases, he further says: "Applying these rulings to the case in hand, we are of the opinion that a State court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in section 22 make strongly for this conclusion but a survey of the scheme of the act and of what it is intended to accomplish, discloses no real support for the opposing view."

In *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, at page 446, Chief Justice White, speaking for the court, concerning section 22 of the Interstate Commerce Act, *supra,* said: "This clause, however, cannot be construed as continuing in shippers a common-law right, a continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

* * * The appellant sets up in his answer and makes an exhibit thereto various orders and rules of the Interstate Commerce Commission and the rules adopted by the United States Railroad Administration, relating to the

supply and distribution of coal cars, which were in effect during the period covered by the appellees' action. We deem it wholly unnecessary to set out and comment upon these rules and the authority upon which the appellant relies to support its contention that the State court was without jurisdiction. We have examined all these rules and considered the authorities, and especially the decision of the Interstate Commerce Commission in the case of *Interstate Commerce Commission* v. *Victor American Fuel Co.* and *Salt Lake Railroad Co.* of July 20, 1926, and we are convinced that these authorities have no application. As we construe the complaint, no attack is made by the appellees upon the rules and orders of the Interstate Commerce Commission relating to the supply and distribution of cars by railroads for the shipment of coal. We cannot discover in the complaint any allegation to the effect that the rules and orders of the Interstate Commerce Commission are unreasonable or unfair, that these rules themselves result in unlawful or unreasonable practice or in unjust discrimination or undue prejudice to shippers. That would involve an administrative question over which the Interstate Commission alone would have jurisdiction.

As is said in *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, *supra*, at page 131: "In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an Interstate carrier for damages occasioned by its enforcement. * * * But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the court being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an Interstate carrier for damages arising in Interstate Commerce may be prosecuted either in the State or Federal courts."

The Interstate Commerce Law which we have quoted above, makes it the duty of carriers by railroads to make

just and reasonable distribution of cars for transportation of coal among the coal mines served by such carrier and when the supply of cars available for service does not equal the requirements of the mines, it is the duty of the carrier to maintain and apply just and reasonable ratings of such mines and count against such mines each and every car furnished for transportation of coal. It is the duty of the carrier under the Interstate Commerce Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.

This is purely an action against the appellant company for its failure to furnish cars, which is its common law, and statutory duty, both Federal and State. But the allegations of this complaint show that this action is bottomed upon appellant's alleged failure to comply with its common-law or contractual, as well as statutory duty to furnish cars under sections 895 and 915, C. & M. Digest.

According to the above decisions of the United States Supreme Court and our own court, appellee had the right to maintain this action under section 22 of the Interstate Commerce Act. It follows that the court did not err in overruling the appellant's demurrer to the complaint. P. R. 350-357.

It is thus seen that the complaint in this case alleges a violation of the statutory and common-law duty of the respondents by the petitioner and that the right to maintain the action was sustained under section 22 of the Interstate Commerce Act.

It will also be seen that this case does not call for the decision of any question as between a State statute or a common-law liability and an act of Congress.

It was conceded in the Supreme Court of Arkansas by the respondents as shown by the opinion of that court that the right of the respondents to recover was to be determined by the Federal law. The Supreme Court of Arkansas affirmed the right of respondents to recover under the Federal law.

The right to recover under the Federal law by a suit in a State court had been declared over and over again in repeated decisions of the Supreme Court of the United States. These decisions of the Supreme Court of the

United States were followed by the Supreme Court of Arkansas in its decision in this case. There is no new question in this case to be determined by this court. The only question in this case, the question of the jurisdiction of the State court to try this suit for damages, has been repeatedly decided by this court. There being no new Federal question to be determined by this court in this case, the petition for writ of certiorari should be denied.

The printed record shows that on June 13, 1927, P. R. 362, an order was entered by an Associate Justice of this court allowing the petitioner herein thirty days from that date within which to apply for a writ of certiorari in this cause.

The judgment of the Supreme Court of Arkansas in this case was entered on February 14, 1927, as shown by the record. The petition for rehearing was overruled on March 14, 1927. The order extending time to make the application for writ of certiorari was on June 13, 1927 and extended it for thirty days. This time expired on July 13, 1927.

Copies of the petition and brief and printed record were delivered to counsel for respondents on July 19, 1927.

This court can determine from an inspection of the record in this case whether or not the application for the writ was perfected as required by law within the extended time. If the application was not perfected within this time the writ should be denied for this reason.

Whether the petition for the writ was perfected within the time required by law or not, we respectfully submit that the petition should be denied on the merits.

U. C. May,

Chas. I. Evans,

Jeptha H. Evans,

Attorneys for Respondents.